No. 90-1388

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PAMELA S. DEMPSEY, SUE TERRY, and NANCY J. PENDERGRAFT,

Petitioners,

v.

HARRY A. BENDIBURG, INDIVIDUALLY, AND AS THE ADMINISTRATOR OF THE ESTATE OF CARL BENDIBURG, DECEASED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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STATUTE

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Petitioners respectfully submit that the Respondent has materially misstated or distorted both the record and the opinions below in the following fashion:

1. Respondent argues that the writ ought be denied by this Court because the first issue presented by Petitioners was never properly raised below. Such argument is patently erroneous. The first issue is whether a state official's qualified immunity defense may be defeated

because the trial court refused to decide the question of official immunity as a matter of law. The Eleventh Circuit Court of Appeals granted Petitioner's leave to appeal pursuant to 28 U.S.C. § 1292(b) following the District Court's denial of summary judgment on this very issue.[1] Once the appeal was granted, every single brief filed by Petitioners squarely confronted the Court of Appeals with Petitioners' argument that the District Court should have decided the qualified immunity defense as a matter of law rather than deferring questions of fact for jury determination. For example, in their brief filed on December 6, 1989, Petitioners stated that:

> With all due respect to the District Court, Judge Forrester simply erred by failing to hold that Appellants Dempsey, Terry and Pendergraft are entitled to qualified immunity. . . . [T]he District Court held that questions of fact remain to be resolved on Appellants Dempsey, Terry and Pendergraft's entitlement to qualified immunity. However, it is clear that this conclusion is erroneous.
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> When the Court applies the proper analysis to Appellants' qualified immunity defense . . . , it is readily apparent that qualified immunity is a legal issue to be decided by this Court under the circumstances of this case.[2]

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[1] See Petition for Leave to Appeal, Court of Appeals Docket No. 89-2055, pp. 15-16.

[2] Appellants' Brief, Court of Appeals, Docket No. 89-8742, pp. 40-43 (12/6/89); *See also* Appellants' Brief, Court of Appeals Docket No. 89-8173, p. 38 (9/5/89); Brief of Appellee,

(Continued on following page)

2. Respondent next attempts to dissuade this Court from granting a writ of certiorari by making the astonishing claim that the Court of Appeals' opinion did not contemplate that the District Court would refer qualified immunity questions of fact to the jury for resolution. Again, not true. The District Court clearly stated that:

> Construing Plaintiffs' evidence liberally . . . **a jury question clearly exists as to whether Defendant's actions were taken in willful disregard for Plaintiff's parental rights.**

Pet. App. "A," p. 62a.

In its relatively abbreviated opinion, the Court of Appeals held that:

> We reverse the summary judgment for the defendant as to the treating nurses and physicians on the section 1983 due process claims. Otherwise, **we affirm essentially on the basis of the carefully reasoned order of the district court** . . . We will not here repeat or amplify all of the points of decision.

Pet. App. "A," p. 3a.

Therefore, notwithstanding the *dicta* quoted by Respondent on page seven of his brief, there can be no doubt but that everyone – the District Court, the Eleventh Circuit Court of Appeals and all parties to the proceeding below – clearly understood that the District Court, even

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Court of Appeals Companion Docket No. 89-8691, p. 35 (1/8/90); Reply Brief of Appellant, Court of Appeals Docket No. 89-8742, p. 13 (1/17/90); Appellants' Suggestion of Rehearing En Banc, Court of Appeals Docket Nos. 89-8173 and 89-8742, p. 2 (9/10/90).

after review of the extensive discovery conducted in this matter, decided that disputed questions of fact concerning Petitioners' qualified immunity defense needed to be presented to the jury for resolution.

This was the issue presented below and this is the issue which requires decision by this Court.

3. In addressing the second issue in this case – whether a due process claim has been stated when a caseworker seeks an *ex parte* juvenile court order to obtain emergency medical treatment for a child – Respondent attempts to side step the teachings of *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100 (1990) by claiming that Petitioners give that case an improperly "narrow reading." (Resp. Brief at 11). Not so.

If nothing else, *Zinermon* clarifies that State officials cannot rely on *Parratt/Hudson* when they have been delegated "the power and authority to effect the very deprivation complained of . . . and also [have] delegated to them the concomitant duty to initiate the procedural safeguards set up by state law. . . ." 108 L.Ed.2d at 122. That simply was not the case here, where the DFACS caseworker had no authority whatsoever to remove Respondent's child from his home without the intervention of a neutral and detached judicial officer, the Juvenile Court Judge of Cobb County, Georgia. Regardless of whether Petitioners had a policy of not notifying parents in *emergency* situations prior to seeking Court-approved removal of children from the homes of abusing parents, which Petitioners have acknowledged, the critical question in this case is whether liability can properly be assessed against a State social services worker for the death of a

child arguably resulting from medical procedures which were – and could only have been – performed pursuant to the order of a court of competent jurisdiction, the Juvenile Court of Cobb County.

Respondent originally attempted to place this liability where it logically belongs: on the juvenile court judge, who failed to demand that more elaborate notice be given Respondent, but the lower court's dismissal of the juvenile court judge has not been appealed by Respondent. Pet. App. "C", p. 25a. With judicial immunity barring any recourse against the ultimate decision-maker in this case, the juvenile court judge, Respondent now seeks to have the "blame" placed on Petitioners. But Petitioners herein did exactly what was sought in *Zinermon*, they followed the very procedures set out in State law – the Juvenile Court Code of Georgia – to obtain a *court order* authorizing the *very conduct* Respondent complains of.

The Juvenile Court Code of Georgia prescribes all the process Respondent is due, but Respondent admits he is not challenging the procedures of the Juvenile Court Code. Resp. Brief at 9, n.4.[3] Indeed, the District Court properly recognized that the **"question before the Court- . . . does not concern the State of Georgia's interest in**

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[3] In this same footnote, Respondent claims that Petitioners did not follow the procedures set out in State law, the Juvenile Court Code of Georgia. Resp. Brief at 9, n.4. Unfortunately for Respondent, such a complaint is barred by *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) which held that the Eleventh Amendment prohibits attempts by the federal courts to require State officials to conform their conduct to State law.

child welfare nor the constitutionality of the procedures implemented to provide it." Pet. App. "B", p. 37a.

Ultimately, however, notwithstanding Respondent's apparent frustration with the doctrine of judicial immunity, it was the *judge's* decision, not an established policy of Petitioners, which removed Respondent's son from his custody. Consequently, it is beyond cavil that *Logan v. Zimmerman*, 455 U.S. 422 (1982) simply does not apply here, *Hudson v. Palmer*, 468 U.S. 517, 543 (1984), and that Respondent's due process claim is, as is discussed fully in the Petition, barred by the *Parratt/Hudson* rule as clarified by *Zinermon*.

THEREFORE, for all the reasons set out above and in the Petition for a Writ of Certiorari, Petitioners respectfully pray that the Court grant a writ of certiorari

to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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